



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 Renner Boulevard  
Lenexa, Kansas 66219

JUN 13 2019

**MEMORANDUM**

**SUBJECT:** Slip Memorandum for Remedial Design Completion (RD 016), Operable Unit 08 – Railroads, Cherokee County Superfund site, Cherokee County, Kansas (KSD980741862)

**FROM:** Elizabeth Hagenmaier, Remedial Project Manager  
Lead Mining and Special Emphasis Branch

**THRU:** Preston Law, Chief   
Lead Mining and Special Emphasis Branch

**TO:** Mary P. Peterson, Director  
Superfund & Emergency Management Division

The Remedial Design Completion for the OU 08 – Railroads Remedial Design, or RD, was scheduled for Quarter 4 Fiscal Year 2019 at the Cherokee County Superfund site. This RD was started under the AES contract with Hydrogeologic, or HGL, in 2016. The RD was to cover all 39 miles of inactive rail lines, following the selected remedy in a 2016 Record of Decision. The inactive rail lines are fragmented with both privately-owned properties and properties owned by Burlington Northern/Santa Fe, or BNSF.

The design on the privately-owned properties is ongoing. The surveys and sampling are complete. Currently, HGL is completing the preliminary design drawings and specifications for the EPA's review.

When the EPA started this RD, it was to include the entire 39 miles of inactive lines. During the RI/FS activities, BNSF allowed the EPA access to its inactive rail road properties for sampling purposes, but that access agreement expired. The agency considered asking BNSF to renew its access agreement, but under our enforcement first policies, the EPA decided to hold off the design of the BNSF-owned properties and request BNSF conduct the RD on its property. This decision caused a few months of delay due to internal decision-making by agency staff and counsel.

The agency decided to send a special notice letter to BNSF requesting a good faith offer for a settlement using an administrative order of consent, or AOC, for RD. The special notice letter included an Information Request, a draft AOC for RD, and was sent on October 22, 2018. The EPA received the first response to the requested information on December 7, 2018 and a supplemental response with the good faith offer, or GFO, on February 20, 2019.

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The agency anticipates that due to the planned coordination with BNSF, the fund-lead RD may require post-RD support from HGL. The EPA plans to share the completed RD documents with BNSF to discuss continuity of design elements across a contiguous rail line. HGL would be retained for post-RD support to answer design questions from BNSF and in case discussions with BNSF require revisions to the fund-lead RD. The estimated completion date of the fund-lead RD is September 30, 2020. The BNSF-owned property would be tracked under a potentially responsible party-lead, or PRP-lead, RD.

After the government shutdown, the agency began to review the BNSF information and its GFO. Preliminary review indicated that contractor support and PRP search was necessary due to the complexities of rail line ownership and to consider various liability theories. The PRP search task order was requested in April, but the earliest it may be awarded is June 30, 2019, due to an overload in processing purchase order requests related to Midwest flooding, etc. Progress on both the fund-lead RD and the enforcement or PRP-lead RD is contingent on the assistance of the PRP search contractor.

The agency plans to hold preliminary discussions with BNSF to discuss the GFO via an in-person meeting in the summer of 2019. Assuming discussions go well, the parties will initiate settlement negotiations on the AOC for RD. The agency anticipates the negotiations may take 60 days. BNSF has retained sophisticated outside legal counsel at Lathrop and Gage, LLC. Additional efforts are underway in responding to a BNSF-submitted Freedom of Information Act, or FOIA, request for information. Also, BNSF legal counsel requests an in-person review of the site file, which may be scheduled in early summer 2019.

The remedial action is to be conducted after completion of the RD. Assuming BNSF enters into the AOC for RD, the agency would request Department of Justice, or DOJ, assistance via a pre-referral for negotiations, or PRN, planned as a separate negotiation and enforcement instrument (e.g., Consent Decree for RA or cash out). The PRN and negotiations would begin as soon as BNSF enters into the AOC for RD. If BNSF refuses to enter into the AOC for RD and depending on the outcome of the PRP Search Report, the agency would consider other enforcement options, e.g., a unilateral administrative order for RD/RA and a PRN to DOJ for a settlement to do work or cost recovery.

Please review this memorandum and sign below if you are in agreement with staff recommendations.

If you have any questions regarding this site, please contact Elizabeth Hagenmaier at (913) 551-7939.

**APPROVAL:**

Mary P. Peterson  
Mary P. Peterson, Director  
Superfund & Emergency Management Division

6/13/2019  
Date